

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01010-COA

ILLINOIS CENTRAL RAILROAD COMPANY

APPELLANT

v.

EDWIN L. BROUSSARD

APPELLEE

DATE OF JUDGMENT:	05/28/2007
TRIAL JUDGE:	HON. FRANK G. VOLLOR
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GLENN F. BECKHAM HARRIS FREDERICK POWERS
ATTORNEYS FOR APPELLEE:	WILLIAM S. GUY C.E. SOREY
NATURE OF THE CASE:	CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
TRIAL COURT DISPOSITION:	DEFENDANT'S MOTION TO DISMISS GRANTED AND DEFENDANT'S MOTION FOR ATTORNEYS' FEES DENIED
DISPOSITION:	REVERSED AND REMANDED: 09/30/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, J., FOR THE COURT:

¶1. This appeal arises from the dismissal of the plaintiff's personal injury lawsuit. The case was dismissed after the circuit court was notified that the plaintiff was in fact deceased at the time the lawsuit was filed by the plaintiff's attorneys. Illinois Central Railroad Company ("Illinois Central"), the defendant in the case, now appeals the circuit court's denial of its request for attorneys' fees. We find that the circuit court erred in denying

Illinois Central's request for attorneys' fees and reverse and remand for further proceedings consistent with this opinion.

FACTS

¶2. On April 12, 2006, a complaint was filed in the Warren County Circuit Court on behalf of Edwin L. Broussard. The complaint alleged claims for personal injuries as a result of Broussard's exposure to asbestos while he was an employee of Illinois Central. In response, Illinois Central filed an answer, along with its requests for discovery. Illinois Central later filed a motion to compel after its requests for discovery went unanswered.

¶3. After conducting an independent investigation, Illinois Central discovered that Broussard was deceased at the time the lawsuit was filed. In fact, Broussard died on August 3, 2004, which was approximately one year and eight months before the complaint was filed on April 12, 2006.

¶4. On April 27, 2007, Illinois Central filed a motion to dismiss and a motion for attorneys' fees and expenses under Rule 11 of the Mississippi Rules of Civil Procedure and the Mississippi Litigation Accountability Act ("Act"). On May 2, 2007, Broussard's attorneys filed a motion to withdraw as counsel and cited Broussard's failure to respond to mail correspondence and phone calls as the basis for the motion.

¶5. The circuit court granted Illinois Central's motion to dismiss; however, Illinois Central's request for attorneys' fees was denied because the circuit court determined that the plaintiff's attorneys were not guilty of "the type of egregious conduct required by the Act and Rule 11 so as to warrant the assessment of attorney[s'] fees and expenses." It is from that denial of attorneys' fees that Illinois Central now appeals.

¶6. Illinois Central argues on appeal that: (1) the filing of a lawsuit in the name of a plaintiff who had died one year and eight months before the filing of the lawsuit was in error and requires the assessment of sanctions under Rule 11 and the Act, (2) the circuit court failed to apply the proper standard required when considering an award of attorneys' fees, and (3) the circuit court erred in finding facts based on insufficient evidence to deny the motion for attorneys' fees and expenses. We find that the circuit court erred by denying the motion for attorneys' fees, and this assignment of error is dispositive of this appeal.

STANDARD OF REVIEW

¶7. Illinois Central contends that whether to impose sanctions under the Act and Rule 11 of the Mississippi Rules of Civil Procedure is a question of law that should be reviewed under a de novo standard of review, citing *In re Estate of Ladner*, 909 So. 2d 1051, 1055 (¶15) (Miss. 2004) as authority. However, we find that the supreme court has clearly stated that the proper standard of review for this issue is an abuse of discretion standard. Both the Act and Rule 11 state that the decision to award sanctions is within the discretion of the trial court. Miss. Code Ann. § 11-55-7 (Rev. 2002); M.R.C.P. 11(b). In *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So. 2d 1041, 1045 n.6 (Miss. 2007), the supreme court held that “[a]n extensive number of cases state that the proper standard of review regarding the imposition of sanctions is abuse of discretion.” The supreme court further stated, “[w]hen reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, this Court is limited to consideration of whether the trial court abused its discretion.” *Id.* at 1045 (¶8) (citation omitted). Accordingly, we conclude that abuse of discretion is the appropriate standard of review.

ANALYSIS

Whether the circuit court abused its discretion by denying Illinois Central's motion for attorneys' fees under Rule 11 of the Mississippi Rules of Civil Procedure and the Mississippi Litigation Accountability Act.

¶8. Illinois Central argues that the circuit court's denial of its request for attorneys' fees was in error. Specifically, Illinois Central claims that filing a lawsuit in the name of a plaintiff, who died over one year and eight months before the filing of the lawsuit, requires the assessment of sanctions. Broussard's attorneys argue that the circuit court did not abuse its discretion in denying attorneys' fees because the lawsuit was not a frivolous pleading, and it was not filed for the purpose of harassment.

¶9. Both Rule 11 and the Act authorize an award of attorneys' fees as a sanction for certain filings. Mississippi Rule of Civil Procedure 11(b) provides that:

If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

Similarly, the Mississippi Litigation Accountability Act states, in part:

in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment

Miss. Code Ann. § 11-55-5(1) (Rev. 2002).

¶10. The Act defines a claim brought “without substantial justification” to be one that is “frivolous, groundless in fact or in law, or vexatious, as determined by the court.” Miss.

Code Ann. § 11-55-3(a) (Rev. 2002). This Court is to use the same test to determine whether a filing is frivolous under both Rule 11 and the Act. *Leaf River Forest Prods., Inc. v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995). A claim is frivolous when “objectively speaking, the pleader or movant has no hope of success.” *Id.* at 196-97 (citation omitted).

¶11. Thus, this Court must determine whether the claims asserted in this case had any hope of success. The supreme court has held that “[i]f a defendant has a complete defense, then it follows that a plaintiff has no hope of success.” *Tricon Metals & Servs., Inc. v. Topp*, 537 So. 2d 1331, 1336 (Miss. 1989). Illinois Central argues that the only logical conclusion is that Broussard, who was deceased, had no hope of success at the time this lawsuit was filed. Broussard’s attorneys respond that Broussard was alive and had a valid claim when he first filed suit against Illinois Central in 2003 as a part of a multi-plaintiff action. That action was ultimately dismissed to be re-filed in the appropriate jurisdiction; thus, Broussard’s attorneys filed this case on behalf of Broussard, individually, on April 12, 2006, subsequent to Broussard’s death. Broussard’s attorneys claim that the filing was necessary in order to comply with the statute of limitations, even though they had no communication with Broussard before the filing of the lawsuit.

¶12. We agree that Illinois Central had a complete defense from the moment this lawsuit was filed. The longstanding rule in Mississippi is that the commencement of a suit in the name of a deceased individual amounts to a nullity. *Humphreys v. Irvine*, 14 Miss. 205, 207 (1846). An objection based on the fact that the plaintiff was deceased when the complaint was filed can be made at any time during the proceedings, and such objection “stops the cause at whatever stage it may be, whenever made known to the court.” *Id.* This rule created

a complete defense for Illinois Central and was the basis of the circuit court's dismissal of the case.

¶13. Because Illinois Central had a complete defense, due to the plaintiff's death one year and eight months prior to the filing of the lawsuit, it follows that there was no hope of success on his claims; thus, this situation falls within the definition of "frivolous" set forth in Rule 11 and the Act. Accordingly, we find that the circuit court abused its discretion by denying an award of attorneys' fees.

¶14. The dissent concludes that the circuit court acted within its discretion by finding that the filing was not frivolous. However, instead of determining whether the claim was frivolous, the circuit court simply concluded that Broussard's attorneys were not guilty of any egregious conduct. Yet, as previously noted, egregious conduct is not the test to determine whether a lawsuit is frivolous and thereby grounds for an award of attorneys' fees under Rule 11 and the Act. Even Broussard's attorneys do not argue that there was any hope for success in the lawsuit that they filed. Presumably, this is because such an argument would be illogical now that they are aware of Broussard's death.

¶15. The only argument of Broussard's attorneys as to the frivolity of the lawsuit, and the argument focused on by the dissent, is that Broussard was alive and had a valid claim against Illinois Central at the time a multi-plaintiff lawsuit was filed in 2003. However, that case was dismissed in November 2005 with instructions to re-file in the appropriate jurisdiction. The second lawsuit filed on Broussard's behalf, the lawsuit that is the subject of this appeal, was a separate and distinct action. *See, e.g., State ex rel. Jacobs v. Trimble*, 274 S.W. 1075, 1077-78 (Mo. 1925) (holding that the death of the petitioner after the filing of her appeal to

the Missouri Court of Appeals but before the filing of her writ of certiorari to the Supreme Court of Missouri required that the writ be quashed because the writ was a separate and distinct action and the petitioner was deceased at the time of its filing). Simply because Broussard was alive and had a valid claim at the time the first case was filed does not give validity to the filing of the complaint in this matter. The fact remains that Broussard died one year and eight months before this action was filed; thus, there was no possibility that the lawsuit against Illinois Central could be successful.

¶16. From its inception, this lawsuit was a nullity. Consequently, it falls under the legal definition of a frivolous lawsuit for which sanctions are authorized under Rule 11 and the Act. While an award of attorneys' fees is within the sound discretion of the circuit court, the undisputed facts in the record before us leave no other conclusion but that this was a frivolous lawsuit under Rule 11 of the Mississippi Rules of Civil Procedure and the Mississippi Litigation Accountability Act. Accordingly, we reverse the circuit court's denial of attorneys' fees, and remand the case to the circuit court for an evidentiary hearing to determine a reasonable and appropriate amount of attorneys' fees to be awarded to Illinois Central.

¶17. THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

CHANDLER, BARNES AND ROBERTS, JJ., CONCUR. ISHEE, J., CONCURS IN PART AND IN THE RESULT. CARLTON, J., CONCURS IN RESULT ONLY. LEE, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., MYERS, P.J., AND IRVING, J.

LEE, P.J., DISSENTING:

¶18. With respect for the majority, I must dissent. I would affirm the judgment of the circuit court as I believe the circuit court acted within its discretion in denying the award of attorneys' fees to Illinois Central Railroad Company.

¶19. The majority finds that Edwin L. Broussard's claim was frivolous because it had no hope of success. I agree that since Broussard was deceased, the claim had no hope of success. However, Broussard's attorneys had no intention of filing a lawsuit that was without merit. When this case was initiated, Broussard was living and had a viable suit based on his exposure to asbestos during his employment at Illinois Central. Broussard was one of 147 plaintiffs who filed suit against Illinois Central for asbestos-related injuries. In November 2005, after changes in the venue laws, many of the plaintiffs' claims, including Broussard's, were dismissed to be re-filed in the appropriate jurisdictions. Broussard's attorneys attempted to contact Broussard, but were unsuccessful. Facing an impending statute of limitations, they filed the claim in the Circuit Court of Warren County. In November 2006, Broussard's counsel discovered that Broussard was deceased and requested that the action be dismissed. It was at this point that Illinois Central discovered that Broussard had been deceased since August 2004.

¶20. In ruling on the issue of attorneys' fees, the circuit court gave the following explanation:

I'm going to dismiss the action, but I'm not going to hold them accountable under 11-55-5 and assess attorney's fees because this action was an action arising – it's not like they just were contacted by Mr. Broussard and didn't do anything. This action was originally filed while he was alive in Hinds County. It was one of those mass lawsuits, and then it was at some point dismissed, and they had to re-file within a certain time limit and re-file in all the appropriate jurisdictions 175 cases. And re-filing it and then him dying in the interim

between all of this going on, the Court does not see the type of egregious conduct that would be warranted under – particularly under Section (i), the extent to which reasonable effort was made. I think their efforts were reasonable in trying to get this matter – because if they waited too long to search all this out, then they’d run into a statute of limitations problem. And then they did contact – I believe in some of the pleadings you say they contacted you last November [to say] that they could not reach him. They filed it in April and then contacted you, saying, we can’t find the fella. So they filed the lawsuit and tried to follow up on it, and I don’t see the type of egregious conduct that would warrant sanctions under 11-55-5 in this particular action. He was alive when it was originally filed. The Court dismissed it and told them – gave them a year to re-file 175 cases. And then during all of that they filed it to protect him and then tried to find the – tried to find him and couldn’t find him after it was filed and notified you they couldn’t find him then, so – and you found out he was dead. . . .

¶21. According to Rule 11, the court may order sanctions “[i]f any party files a motion or pleading which, *in the opinion of the court*, is frivolous” M.R.C.P. 11(b). The circuit court’s opinion was that the filing was not frivolous. Further, the Mississippi Litigation Accountability Act states that the court may award reasonable attorney’s fees and costs if the court “finds that an attorney or party brought an action . . . that is without substantial justification, or that the action . . . was interposed for delay or harassment” Miss. Code Ann. § 11-55-5 (Rev. 2002). Again, there is no assertion that counsel for Broussard filed this action without substantial justification or for delay or harassment. Broussard’s counsel had many clients in the suit against Illinois Central and, unable to contact Broussard, thought they were being diligent by continuing to pursue the lawsuit on his behalf. As the majority states, “the proper standard of review regarding the imposition of sanctions is abuse of discretion.” *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So. 2d 1041, 1045 n.6 (Miss. 2007). Keeping that standard in mind, I find that the circuit court did not abuse its discretion.

¶22. Therefore, since I feel that the circuit court acted within its discretion, I would affirm the judgment of the circuit court granting the motion to dismiss and denying an award of attorneys' fees.

KING, C.J., MYERS, P.J., AND IRVING, J., JOIN THIS OPINION.